IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17038 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISHWARBHAI MOTIBHAI MALI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 17038 of 2003

MR HR PRAJAPATI for Petitioner No. 1

MR MR PRAJAPATI for Petitioner No. 1

MS P B SHETH AGP for Respondent No. 1-3

RULE SERVED for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 21/04/2004

ORAL JUDGEMENT

The petitioner above named has preferred this petition under Article 226 of the Constitution of India for appropriate writ, order or direction, for quashing and setting aside an order of detention dated 14/11/03 passed by respondent no.2 herein, in exercise of the powers u/s.3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (for short, "the said Act").

2. It was alleged against the petitioner that three prohibition offences were registered against him before Makarpura and Ravpura Prohibition Police Stations at C.R.No.28/2003, 789/2003 and 110/2003 for offences punishable u/s.66, 65 and 81 of the Bombay Prohibition Act, 1949. It was also alleged against the petitioner that two witnesses had given statements against him saying that he was engaged in bootlegging activities. On the strength of the aforesaid three registered offences and two statements of unnamed witnesses, the detaining authority found the petitioner to be a "bootlegger" and accordingly, the impugned order of detention was passed against him.

3. Feeling aggrieved by the said order of his detention, the petitioner has preferred this petition before this Court. It has been contended here that the detaining authority has considered the fact that externment proceeding was going on against the petitioner and that a Show Cause Notice u/s.59 of the Bombay Police Act was issued against the petitioner. That though the said Notice was considered by the detaining authority, the reply thereto, was not considered and it was not supplied to the petitioner along with other materials. That, therefore, the petitioner could not submit an effective representation and consequently, the further continuance of the detention of the petitioner is illegal. The petitioner has, therefore, prayed that the present petition be allowed and the order of detention be quashed and set aside.

4. On receipt of the petition, Rule was issued and in response to the service of notice of Rule, Ms.P B Sheth learned AGP has appeared on behalf of the respondents. I have heard the learned advocates for the parties and have perused the papers.

5. The learned advocate for the petitioner has contended that the detaining authority has considered the fact that externment proceeding was going on against the petitioner and that a Notice u/s.59 of the Bombay Police

Act was issued and served upon the petitioner. There is no dispute about the same. The learned advocate for the petitioner has further argued that while relying on the Notice issued u/s.59 of the Bombay Police Act, the reply submitted thereto by the petitioner, has not been taken into consideration and a copy thereof has not been provided to the petitioner despite his demand.

6. On this aspect of the case, we may refer to the affidavit at page 30. On going through the said affidavit, it can be gathered that it has not been stated therein that the reply to the said Notice submitted by the petitioner was considered by the detaining authority and that a copy thereof was supplied to the petitioner. Moreover, the documents which were required to be supplied were not actually supplied by the said authority. It can also be gathered that certain statements were recorded and appropriate affidavit to that effect has also not been filed.

7. It is not the case of the detaining authority that reply to the Show Cause Notice was not received by the concerned authority. It is also not the case of the said authority that a copy thereof was supplied to the petitioner. On the other hand, the representation at page 24 shows that a copy of the reply to the Show Cause Notice was demanded by the petitioner.

8. So, on the one hand, the Show Cause Notice was considered by the detaining authority and on the other hand, the reply to the said Notice was not considered by the detaining authority. So, it can be said that when a Show Cause Notice is considered and when reply to the same has been received, then it has to be accepted that the Show Cause Notice and reply to the same, would become part and parcel of the same proceeding. This would be two sides of the same coin. Therefore, once a Show Cause Notice has been considered, it would be necessary for the authority to consider the reply to the same, if any, received from the person concerned. It is not the case of the deponent of the affidavit that such a reply was not received at all. Therefore, once the reply has been received and once the Notice to show cause has been considered, it was necessary for the detaining authority to consider the reply thereto.

9. In Smt. Zarina Nafees Hyder Rizvi V/s. State of Maharashtra reported in 1999 C.L.J.434, a Division Bench of the Bombay High Court has considered this aspect and has observed that the detenus reply to the show cause notice dated 05/05/97 was a vital document and its

non-placement before the detaining authority has vitiated the detention order on account of non-application of mind. That since it was a vital document, the detaining authority should have supplied its copy, in order to enable the detenu to make an effective representation under Article 22(5) of the Constitution of India and failure to do so has precluded the detenu from making an effective representation under the said provision.

10. In the present case also, we find that reply to the show cause notice was a vital document and therefore, the detaining authority was required to consider the same and was required to supply copy thereof to the petitioner. However, that has not been done. Therefore, a valuable right of the petitioner to make an effective representation under Article 22(5) of the Constitution of India has been defeated. Therefore, the order of detention of the petitioner cannot be sustained in the eye of law and hence, it is required to be quashed and set aside.

11. For the foregoing reason, this petition is allowed. The impugned order of detention dated 14/11/03 passed by respondent no.2 against the petitioner, is ordered to be quashed and set aside. Detenu, Ishwarbhai Motibhai Mali, is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute with no order as to costs. Direct service permitted.

(D. P. Buch, J.)

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